

89-7 05

No. _____

Supreme Court, U.S.
FILED

NOV 1 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STEPHEN MARIORENZI,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS

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NOVEMBER 1989

15.02



QUESTION PRESENTED

Whether *Jackson v. Virginia*, 443 U.S. 307 (1979) requires an expert witness to testify that benzoylecgonine is a metabolite unique to cocaine when a conviction for cocaine use is predicated upon a urinalysis which tests positive for benzoylecgonine.



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UNITED STATES OF AMERICA,
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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner, Stephen Mariorenzi, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 26, 1989.

OPINIONS BELOW

The United States Air Force Court of Military Review issued an unreported decision on February 10, 1989 (Appendix A). The opinion of the United States Court of Military Appeals is reported at 29 M.J. — (C.M.A. 1989) (summary disposition) (Appendix B).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 26, 1989. The juris-

diction of this Court is invoked under 28 U.S.C. § 1259 (3) (Supp III 1985) and 10 U.S.C. § 867(h) (Supp III 1985).

STATEMENT OF THE CASE

The petitioner, an Air Force staff sergeant (E-5), was tried by a general court-martial in October 1988, at Kirtland Air Force Base, New Mexico. Contrary to his pleas, he was convicted of wrongfully using cocaine. The petitioner was sentenced to a bad conduct discharge, confinement for six months, and a reduction to airman basic (E-1).

The Government's case was based upon a urinalysis that tested positive for benzoylecgonine—a cocaine metabolite. In support of its case, the Government relied upon the expert testimony of Dr. John Vasiliades. He testified, among other things, that benzoylecgonine is a major metabolite of cocaine. Additionally, he indicated it is "not normally . . . present in the urine." However, Dr. Vasiliades did not testify that cocaine is the *only* possible source of benzoylecgonine. That is, this issue was never addressed at trial.

The United States Air Force Court of Military Review affirmed the trial results. In particular, the Court held as follows:

Based on our independent review of the evidence we are satisfied beyond a reasonable doubt that the [petitioner] wrongfully used cocaine on or about the date alleged.¹

United States v. Mariorenzi, ACM 27291, slip op. at 2 (A.F.C.M.R. Feb. 10, 1989).

The United States Court of Military Appeals affirmed on the basis of *United States v. Boulden*, 29 M.J. 44

¹ The Air Force Court of Military Review possesses fact finding powers pursuant to Article 66(c), Uniform Code of Military Justice.

(C.M.A. 1989). *United States v. Mariorenzi*, 29 M.J. — (C.M.A. 1989) (summary disposition). *Boulden* is a urinalysis case wherein the evidence was challenged as being legally insufficient to support a conviction for cocaine use. The Court of Military Appeals held the “testimony as a whole reasonably implies that the presence of the benzoylecgonine metabolite in urine is a proper basis upon which to identify cocaine use.” *Id.* at 47.

REASONS FOR GRANTING THE WRIT

The United States Court of Military Appeals resolved the petitioner’s case on the basis of its recent decision in *United States v. Boulden*, 29 M.J. 44 (C.M.A. 1989). In *Boulden* the appellant contended that the evidence failed to establish that benzoylecgonine was unique to cocaine. After reviewing the evidence, the Court of Military Appeals rejected this contention. The Court held that the presence of benzoylecgonine “is a proper basis upon which to identify cocaine use.” *Id.* at 47. As a result, *Boulden* appears to have reversed the Court’s earlier line of cases. That is, the broad language—“the presence of the benzoylecgonine metabolite is a proper basis”—appears to extend beyond the facts in *Boulden*. Ironically, the Court has invoked *Jackson v. Virginia*, 443 U.S. 307 (1979), as the basis for both of these polar results. While *Jackson* has remained unchanged, its application appears to be another matter.

In *Jackson* this Court dealt with the issue of whether the evidence was sufficient to support a conviction of premeditated murder. Accordingly, this Court postured the analysis in the following manner:

[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not

require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." . . . Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Id. at 318-319. Moreover, there is no lack of judicial guidance on the application of the *Jackson* analysis. *United States v. Powell*, 469 U.S. 57 (1984); *United States v. Austin*, 786 F.2d 986 (10th Cir. 1986); *United States v. Cattle King Packing*, 793 F.2d 232 (10th Cir. 1986).

In *United States v. Harper*, 22 M.J. 157, 161 (C.M.A. 1986), the Court of Military Appeals held that "[t]he mere presence of the drug or its constituent elements in the body has not been expressly held by this Court to be a *fact* sufficient to show use of that drug." (Emphasis added). Instead, the Court required evidence that the metabolite was not naturally produced by the body or any other source save the drug in question. *Id.* Additionally, in *United States v. Murphy*, 23 M.J. 310, 312 (C.M.A. 1987), the Court required expert testimony to "interpret" the scientific evidence of a urinalysis prosecution.

These requirements were intended to provide a rational basis for inferring specific drug use. *United States v. Murphy*, 23 M.J. at 312. That is, the scientific evidence must be focused in this manner or else it will generate equivocal inferences. As previously stated, these requirements are rooted in *Jackson*. *United States v. Harper*, 22 M.J. at 161; *United States v. Murphy*, 23 at 312. Finally, these requirements were designed for the purpose of "greatly assist[ing] an appellate court's review" *United States v. Murphy*, 23 M.J. at 312. In *United States v. Boulden*, 29 M.J. 44 (C.M.A. 1989), the Court of Military Appeals reversed its earlier precedent.

Namely, the Court reduced the *Harper* and *Murphy* requirements to mere "preferences". *United States v. Boulden*, 29 M.J. at 47. In addition, the Court held that "the presence of the benzoylecgonine metabolite in urine is a proper basis upon which to identify cocaine use." *Id.* Hence, the Court's decision now equates—as a matter of fact—the presence of benzoylecgonine with cocaine use.

The *Jackson* analysis requires, among other things, that a reviewing court analyze the evidence from the perspective of a "rational trier of fact". *Id.* at 319. However, in *Boulden* the Court merely substituted its opinion for that of a rational trier of fact. Namely, *Boulden* reversed *Harper* and *Murphy*, however, it never stated a reason—from the perspective of a rational fact finder—why the evidentiary requirements have been lowered. Hence, *Boulden* is a misapplication of *Jackson*.

In the instant case, the Government offered no evidence to rule out the possibility that the benzoylecgonine was derived from some source other than cocaine. In fact, Dr. Vasiliades' testimony implies that this metabolite may be naturally found, on occasion, in an individual's urine. Thus, there is no evidence for any rational trier of fact to conclude, beyond a reasonable doubt, that the mere "presence" of benzoylecgonine is consistent with cocaine use. In short, the evidence generates equivocal inferences and, as such, no rational trier of fact would premise a conviction upon such illusory evidence.

It is apparent that the *Harper* and *Murphy* line of cases are distinguishable from *Boulden*. The difference, of course, lies in the application of *Jackson*. *Jackson* holds that evidence is legally sufficient to sustain a conviction if a rational factfinder could, taking the evidence in a light most favorable to the Government, find proof of guilt beyond a reasonable doubt. Unless the Government can establish the uniqueness of benzoylecgonine, no rational factfinder can draw any definitive inference from the presence of this metabolite. Hence, it is neces-

sary for an expert witness to testify to the fact that the metabolite is not naturally produced by the body or any other source except the drug in question. Without this type of expert testimony, the inferences are inconsistent with *Jackson v. Virginia*, 443 U.S. 307 (1979). Since the reasonable doubt standard requires proof to a "near certitude" of guilt, only the *Harper and Murphy* requirements align with *Jackson*. *Jackson v. Virginia*, 443 U.S. at 315. Accordingly, the United States Court of Military Appeals erred when it affirmed the petitioner's case on the basis of *Boulden*.

Time has demonstrated that urinalysis prosecutions are the bedrock of the military's war on drugs. However, it is equally apparent that the most basic issue—what constitutes legally sufficient evidence—remains confused. As such, it is incumbent upon this Court to address this issue. The consequences are profound for this petitioner, and every other military member, who must submit to urinalysis testing. Hence, this petition raises matters of unequalled importance.

CONCLUSION

The petitioner submits that pursuant to *Jackson v. Virginia*, 443 U.S. 307 (1979), the expert testimony was insufficient to sustain a conviction premised upon the results of a urinalysis which tested positive for benzoylecgonine.

Respectfully submitted,

RICHARD F. O'HAIR

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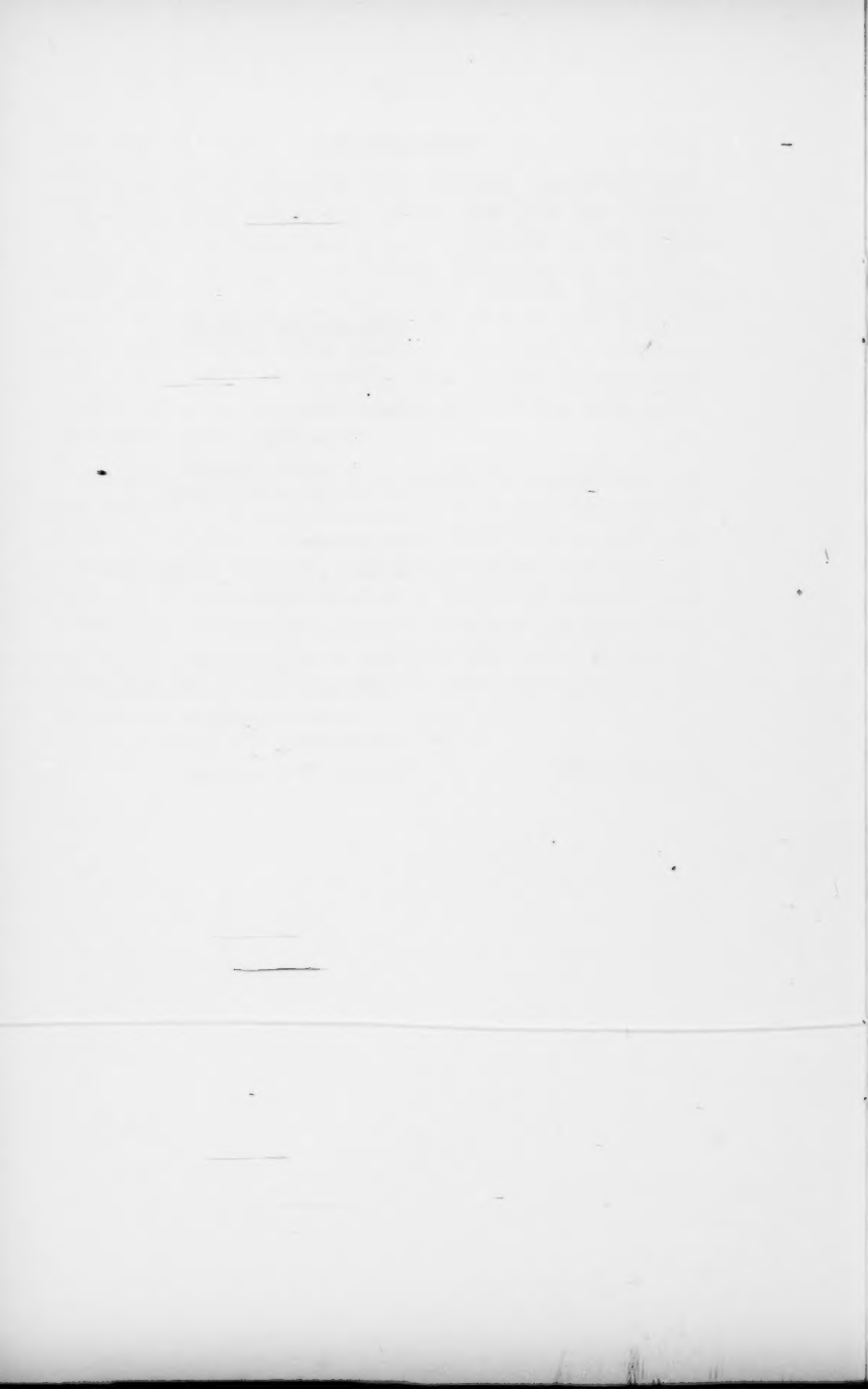
Captain, Office of The Judge

Advocate General

United States Air Force

Counsel for Petitioner

NOVEMBER 1989



APPENDICES



1a

APPENDIX A

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

UNITED STATES

v.

Staff Sergeant STEPHEN, MARIORENZI, FR 037-44-5229
UNITED STATES AIR FORCE

ACM 27291

10 February 1989

Sentence adjudged 13 October 1988 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: Stephen R. Bloss (sitting alone).

Approved Sentence: Bad conduct discharge, confinement for six (6) months and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Paul M. Dankovich.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Major Kathryn I. Taylor.

Before

LEWIS, BLOMMERS and KASTL
Appellate Military Judges

DECISION

PER CURIAM:

Despite his pleas of not guilty the appellant was found guilty of wrongful use of cocaine in a trial before a military judge, sitting alone. Proof of the offense was based on urinalysis evidence. The appellant's sentence, as adjudged and approved, consists of a bad conduct discharge, confinement for six months and reduction to airman basic. Appellate defense counsel have assigned as error an alleged failure of proof that the appellant ingested cocaine. They argue that the prosecution's expert witness failed to identify the metabolite, benzoylecgonine, as unique to cocaine and to eliminate the possibility that the metabolite might be produced naturally within the human body.

Evidence that an identified metabolite is unique to the controlled substance being charged and that it is not otherwise produced by the human body is required to sustain a conviction of wrongful use of the substance in a urinalysis case. *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987); *United States v. Harper*, 22 M.J. 157 (C.M.A. 1986). It is necessary that trial counsel in urinalysis cases nail down these related factual issues. Trial counsel must approach this task with a healthy sense of caution. *United States v. Dawdy*, 17 M.J. 523, 527, at n.5 (A.F.C.M.R. 1983), *aff'd/rev'd in part*, 19 M.J. 69 (1984) (summary disposition). Adherence to the aforementioned *Murphy/Harper* requirement continues to receive close scrutiny at the appellate level.

The government expert testified, among other things, that the major metabolite of cocaine, benzoylecgonine, is not normally found in the human body, nor is it normally excreted in one's urine; that its presence in urine, along with other cocaine metabolites, permits an inference "that cocaine had to be taken into the [appellant's] system at some point," and that it is "very, very, very very unlikely" to "impossible" that a substance exists whose presence will

exhibit the distinctive testing "peaks" of benzoylecgonine. This testimony, when considered in the context of all the scientific evidence in the record, was legally sufficient to establish ingestion of cocaine by the appellant. Based on our independent review of the evidence we are satisfied beyond a reasonable doubt that the appellant wrongfully used cocaine on or about the date alleged.

We have noted certain questionable aspects of the expert witness' testimony concerning the gas chromatography/mass spectography test procedure; that is, the identification of the minimum concentration level for a positive benzoylecgonine result and the concentration level of a certain control urine sample. We accept the authenticated record as a true reflection of the expert's testimony. R.C.M. 1104(a)(1). However, we urge all those involved in the preparation and authentication of records of trial to exercise due care to insure that an accurate record of proceedings is achieved.

The findings of guilty and sentence are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 62299/AF
CMR Dkt. No. 27291

UNITED STATES,

Appellee

v.

STEPHEN MARIORENZI, (037-44-5229),

Appellant

ORDER

On further consideration of the granted issue (28 MJ 342) in light of *United States v. Boulden*, 29 MJ 44 (CMA 1989), it is, by the Court, this 26th day of September, 1989.

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

